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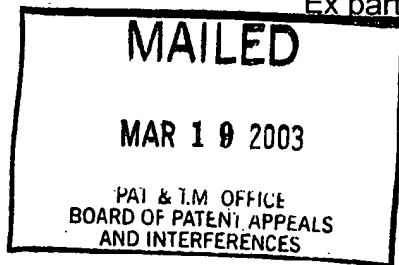
The opinion in support of the decision being entered today was not written
for publication and is not binding precedent of the Board.

Paper No. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

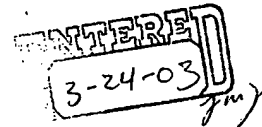
**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte MARC A. JURGOVAN and MARTIN B. DIERL



Appeal No. 2002-2113
Application No. 09/372,646

HEARD: March 4, 2003



Before ABRAMS, FRANKFORT, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 to 26,
which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellants' invention relates to flexible packages having means for selectively re-closing the package after their initial opening (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

Claims 1 to 12 and 17 to 22 stand rejected under 35 U.S.C. § 103 as being unpatentable over Christoff¹.

Claims 13 to 16 and 23 to 26 stand rejected under 35 U.S.C. § 103 as being unpatentable over Christoff in view of Thompson².

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer (Paper No. 15, mailed October 19, 2001) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 14, filed August 15, 2001) and reply brief (Paper No. 19, filed April 16, 2002) for the appellants' arguments thereagainst.

¹ U.S. Patent No. 4,617,683.

² U.S. Patent No. 5,224,779.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by the appellants and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 1 to 26 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

All the claims on appeal recite the combination of (1) a flexible package and (2) a food product stored in the package. The flexible package comprises, inter alia, a front wall and a rear wall sealed together at a top seal; first and second engagement

members engaged together; and the top seal and the engagement members being pinch-grip openable under a pinch-grip pulling force applied to the front and rear walls below the engagement members.

After setting forth the teachings of Christoff, the examiner ascertained³ (answer, p. 4) that Christoff does not specifically recite the use of potato chips as the packaged product. The examiner then concluded that it would have been obvious to one of ordinary skill in the art to package foods such as potato chips in the invention of Christoff since Christoff shows what appears to be chips in Figures 1-2 and also teaches the conventionality of packaging potato chips in bags (column 2, line 24).

The appellants do not dispute the examiner's determination that it would have been obvious to one of ordinary skill in the art to package foods such as potato chips in the invention of Christoff. The appellants do dispute the examiner's ascertainment of the differences between the claimed subject matter and Christoff. Specifically, the appellants argue (brief, pp. 4-4-7; reply brief, pp. 1-3) that Christoff does not disclose a flexible package having the combination of (1) a front wall and a rear wall sealed together at a top seal; (2) first and second engagement members engaged together;

³ After the scope and content of the prior art are determined, the differences between the prior art and the claims at issue are to be ascertained. Graham v. John Deere Co., 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966).

and (3) the top seal and the engagement members being pinch-grip openable under a pinch-grip pulling force applied to the front and rear walls below the engagement members.

Christoff's invention relates to the art of reclosable bags, the material for making such bags, and is more particularly concerned with bags of the kind provided with extruded resiliently flexible plastic profiled reclosable separable fastener means. Figures 1-3 show a reclosable bag 20 having a body with a top end 21 and a bottom end 22 and confronting walls 23 and 24. Elongated, extruded resiliently flexible plastic profiled reclosable fastener strip means 27 are secured to the walls 23 and 24 at the top end 21 of the bag body. Any material which will suit the purpose for which the bag 20 is intended may be employed. Thin sheet-form packaging material such as suitable thermoplastic, and if desired gas impervious single layer or laminated extruded film formed from polyethylene, polypropylene, and the like, may be utilized.

In the finished fully sealed bag the interlockable profiles 52 of the reclosable fastener strip means 27 may remain separated as shown in Figure 2 until the top end or mouth of the bag has been opened as shown in Figure 3 for access to contents in the bag, and then the bag can be closed by interengagement of the profiles 52 as shown in Figure 3. Opening of the bag may be effected either by pulling the seal 42 at the top

end of the bag open, or by severing the top end of the bag along a line 58 between the seal 42 and the reclosable fastener 27 and then using the sidewall portions 59 located outwardly from the reclosable fastener strip means 27 as pull flanges for pulling the closed fastener open when desired.

Christoff teaches (column 9, lines 14-40) that

[w]here it is desired to provide a reclosable fastener bag with bag making material such as represented in FIGS. 11 and 12, but further equipped with means for securing a substantially air tight closure, the arrangement shown in FIG. 15 may be employed wherein the bag material is provided adjacent to the separable fastener, or as part of the separable fastener, with a closed cell elastomer sealing rib 80 folded upon itself together with the associated fastener strip 44 and adapted when the fastener profiles 52 are snapped together to press sealingly together substantially as shown. In one preferred form, the closed cell elastomer sealing rib 80 may be applied as a coextrusion onto a flange extension 81 along the side of the strip 44 which will be located at the innerside of the bag.

On the other hand, an air sealing arrangement such as shown in FIG. 16 may be provided wherein complementary profiled fastener strips 82 and 83 may be secured to the mouth end portions of a reclosable bag 84 and with closed cell elastomer sealing strips ribs 85 carried by the fastener strips 82 and 83 in a manner to press against one another in the closed fastener condition of the assembly. In this arrangement, the fastener strip 82 may have four profiles, and the fastener strip 83 may carry three complementary fastener profiles, of generally arrow shape as shown, and which interhook with one another in the closed condition of the fastener.

To meet a claim limitation, a prior art reference must disclose that limitation either explicitly or inherently. See In re Schreiber, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997). As stated in In re Oelrich, 666 F.2d 578, 581, 212 USPQ 323, 326 (CCPA 1981) (quoting Hansgirk v. Kemmer, 102 F.2d 212, 214, 40 USPQ 665, 667 (CCPA 1939)) (internal citations omitted):

Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient. If, however, the disclosure is sufficient to show that the natural result flowing from the operation as taught would result in the performance of the questioned function, it seems to be well settled that the disclosure should be regarded as sufficient.


Thus, a prior art reference may meet a claim limitation not expressly found in that reference if the limitation is nonetheless inherent in it. See In re Oelrich, 666 F.2d at 581, 212 USPQ at 326; Verdegaal Bros., Inc. v. Union Oil Co., 814 F.2d 628, 630, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Under the principles of inherency, if the prior art necessarily functions in accordance with, or includes, the claimed limitation is met. See In re King, 801 F.2d 1324, 1326, 231 USPQ 136, 138 (Fed. Cir. 1986). However, inherency is not necessarily coterminous with the knowledge of those of ordinary skill in the art. See Mehl/Biophile Int'l Corp. v. Milgraum, 192 F.3d 1362, 1365, 52 USPQ2d 1303, 1305-06 (Fed. Cir. 1999); Atlas Powder Co. v. Ireco Inc., 190 F.3d 1342, 1347, 51 USPQ2d 1943, 1946-47 (Fed. Cir. 1999).

After reviewing the disclosure of Christoff, it is our opinion that Christoff does not disclose a flexible package having the claimed combination of (1) a front wall and a rear wall sealed together at a top seal; (2) first and second engagement members engaged together; and (3) the top seal and the engagement members being pinch-grip openable under a pinch-grip pulling force applied to the front and rear walls below the engagement members. In that regard, the examiner has not established that the above-noted claimed combination is met by Christoff under the principles of inherency. That is, the examiner has not presented sufficient evidence that the reclosable bag of Christoff necessarily has both a top seal and first and second engagement members engaged together wherein both the top seal and the engagement members are pinch-grip openable under a pinch-grip pulling force applied below the engagement members. Absent such evidence, we are constrained to conclude that the examiner's position is based on speculation, probability and/or possibility that Christoff's reclosable bag has both a top seal and first and second engagement members engaged together wherein both the top seal and the engagement members are pinch-grip openable under a pinch-grip pulling force applied below the engagement members.

For the reason set forth above, the subject matter of claims 1 to 12 and 17 to 22 is not suggested by Christoff. Accordingly, the decision of the examiner to reject claims 1 to 12 and 17 to 22 under 35 U.S.C. § 103 is reversed.

CONCLUSION

REVERSED


JEFFREY V. NASE
Administrative Patent Judge

BOARD OF PATENT
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AND
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Application No. 09/372,646

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ROTHWELL, FIGG, ERNST & MANBECK, P.C.
1425 K STREET, N.W.
SUITE 800
WASHINGTON, DC 20005

JVN/jg